## CP

Counterplan Text: The United States should value community-based prosecutorial discretion in the criminal justice system.

The counterplan is mutually exclusive. The CP incorporates the voices of local communities to achieve retributive equality. **Alfieri 99**[[1]](#footnote-1)

The **community justice-based** model of **prosecutorial discretion proceeds from** the premise of **lawyers as** morally independent **agents within** a system of **adversarial justice**.361T his model struggles against the competing roles and functions of prosecuting and defense attorneys in the criminal justice system.362 Under its alternative template, the function of **the prosecutorial role expands** beyond the predicate state obligation to the public **to encompass both victim and defendant communities**. In contrast to the usually obscurantist role of defense counsel,363 here prosecutorial role performance combines both intrasystemic and extrasystemic appeals to justice. Intrasystemic appeals invoke **principles of justice embodied in** **the** legal **system and public morality.**364 Appeals of this kind **compel the** prosecutorial **duty to bargain justly**.365 Conversely, they bar "prosecutorial reliance on tactical and resource considerations'366 in the exercise of ethical discretion. **Informing** both **rehabilitative and punitive** discretionary **judgments, the appeals** strive to **achieve a retributive equity of blame and responsibility**, hence to strike a balance of equitable attribution and blameworthiness,367 in spite of the ambiguity of criminal rehabilitation and punishment.368

The counter-plan solves the case better. It builds community solidarity, deconstructing identity while solving the State manipulation at the heart of modern power structures. **Alfieri 99**[[2]](#footnote-2)

Conceiving the **prosecutor**ial function **as a political project dedicated** both **to dismantling hierarchical structures** of racial identity and narrative, and to building oppositional forms of advocacy that liberate subordinate images and discourses, **pushes prosecutors into** a model of **community participation**. Here the community at stake travels far out-side local boundaries to countenance a historical community connected by common issues of racially subordinated identity and narrative. Relevant models of community participation may be found in prior instances of identity-based criminal violence, even when confounded by the crosscutting categories of race, ethnicity, and gender that reflect the individual and group diversity of color.657 The **failure to recognize** the historical intersection of **gender, ethnicity, and class** 658 **in race cases permits** the continued manipulation of stereotypical images "in the service of political or economic expediencies."659 Ending the **state manipulation of stereotypical imagery** demands a study of race as a political and cultural project. In the Louima case, this overlapping project involves a process of sociolegal reimagination specific to the black male body. For Michael Uebel, undertaking a recasting of the signifying male body introduces "a political enterprise, aimed at producing new solidarities and exposing the bounds of the dominant and 'normal' as fragile and subject to revision."660 Recasting directs the mapping of identities in terms antagonistic to "colonial fantasy and the iconography of racial masculine bodies."661 From this mapping, theoretical models may emerge "that are aimed at supplanting reductive accounts of identity formation at the intersection of race and masculinity."'662 The Louima case illustrates the performative intersection of race and masculinity. In demonstrating that the identity categories of race, sexuality, and nationality may be readily "defined less as fixed identities rooted in bodies, normative sexuality, nature, or geography, and more as dynamic and dramatic modes, the sum of one's cultural prac-tices,"663 the Louima assaults how that the cultural politics of race and masculinity play out in the sociolegal context of the criminal and civil justice systems. The play of racial masculinities in the Louima case highlights the "dynamic modes of cultural practice" in legal advocacy and adjudication.664 Evidence of this dynamic, divulged in "shifting, repeating sets of performances "with no "fixed or essential subject category,"665 compels the investigation of white/black masculinity" as a re-visionary process, a constitutive performance"666that inscribes race and masculinities within the cultural politics of performativity.667 The juridical inscription of racial and masculine subjectivities in the Louima case through the contextualized performance of criminal and civil advocacy constitutes a "politics of representation" that manufactures its own social and political existence.668 Confronting the harsh reality of that racially oppressive and segregated existence, and its animating politics of legal representation, commences a gradual process of ethical positioning for prosecutors, victims, and communities of color.669 This process involves the move toward the **prosecutorial** exercise of **race-conscious, community-oriented** ethical **judgment** accompanied by joint victim/community acts of moral solidarity. In these ethical moments,670 **prosecutor, victim, and community** collectively **acknowledge that the** discursive and symbolic **systems** of meaning **that configure race, sex, class, and nation** **may be** constructed and **deconstructed by** the force of human agency.671 Here, deconstruction refers to **the contest over** the **performative space in** law and **legal advocacy** where identity categories become constituted.672 Unsurprisingly, **the construction** and negotiation **of identity** brokered **in this space occurs** "**against a** complex historical **matrix of** alterities, against a web of differences" signified by **race, class, gender, and sexual orientation.**

The net benefit is Racism

Status quo prosecutorial discretion makes systemic racism inevitable. Only the counterplan solves the colorblindness at the heart of white supremacy by incorporating the views of the community. **Alfieri 99**[[3]](#footnote-3)

**Liberal** models of lawyer **discretion suffer** deep-seated internal **tensions** rankling the pursuit of client, lawyer, and community interests. The **conflicting endorsement of client autonomy and lawyer independence** under the same normative slate of liberal individualism **works to the detriment of community** conceptions of a higher collective good. That endorsement also gives little guidance to the lawyer-client analysis of options in light of their impact on individually joined community. Additionally, though the privileged position accorded to autonomy under a theory of liberal individualism seems clear-cut, the scope of the privilege falls unbounded. Indeed, liberal theory seems to waver in the "acceptance of autonomy as a desirable end in itself, rather than as a means to the attainment of the good."348 Similarly, it seems to falter both in asserting the neutral quality of liberal autonomy "irrespective of the use to which it is put,"349 and in accommodating the adverse consequences flowing to individuals and communities. Consider then an alternative account of autonomy tied to community interest and collective responsibility.350L like the standard liberal vision, this account views lawyer discretion, and more specifically prosecutorial discretion, as an institutional necessity of the criminal justice system. Accepting that necessity, Angela Davis concedes the difficulty of "imagin[ing] a fair and workable system that does not include some level of measured discretion in the prosecutorial process."351 Whether the institutional incentives and disincentives driving that discretion may accommodate competing considerations of merit, justice, and racial community evades easy answer. By way of answer, however, consider first merit-based discretion. The merit-based model of liberal ethical discretion seems well grounded in conventional ethics rules. In the criminal arena, for example, Model Rule 3.8 recognizes the function of merit in the exercise of prosecutorial decisionmaking.352Under that Rule, the demands of **merit-based discretion strive to guarantee impartiality** and state inde-pendence.3 Both elements are essential for legitimacy reasons. Here, the idea of legitimacy seems **untouched by** speculation of **racial harm** to the defendant or victim, and to the communities that may embrace each. Legitimacy remains undiminished because the theory of merit-based **prosecution relies on colorblind** claims of **punishment fired by the race-neutral logic of instrumental** and intrinsic **reasoning**.354 Driving the rationality of merit-based action, **these** claims **ignore** the fact **that prosecutorial discretion presents "a major cause of racial inequality in the c**riminal **j**ustice **s**ystem."355 **Causal neglect** of this kind **fosters the view of systemic racial inequality as a necessary cost of** prosecutorial **agency.**356 The sociolegal institutions of the state tolerate that view. **Curing** the **systemic racial inequality** operating **in** **criminal justice** institutions **requires community-based prosecutorial discretion**. Converting institutional tolerance of systemic racial inequality into institutional condemnation under an ethical rationale of a community-oriented, racial justice-based model of prosecutorial discretion begins with a sense of moral activism. Consider David Luban's notion of moral activism in evaluating this contemplated conversion. Luban argues that "morally activist lawyers should sometimes refrain from zealously advancing lawful client interests even when the threat to third parties is minimal or even intangible, and even when the benefit to the client may be substantial."357 Specifically, he urges avoiding the performance of "collectively harmful actions."358 Transmuting Luban's cautionary prohibition for civil jus-tice into an exhortation for the use of prosecutorial power as a collective instrument of racial justice conforms to a community justice-based model of discretion. To that end, Angela Davis recommends deploying such power "to construct effective solutions to racial injustice."359Fo r Davis, prosecutors possess "the power, discretion, and responsibility to remedy the discriminatory treatment of African Americans in the criminal justice process."360

Rehab only makes the problem worse. It removes all checks on discretion which leads to racist sentencing. **MacKenzie 6:**[[4]](#footnote-4)

For many, the answer to this question was no; the officials should not be given such wide discretion. However, liberals and conservatives differed in why they wanted to limit discretion. Conservatives argued that the judges and parole boards were too lenient; they used their discretion to release predatory criminals who continued to victimize innocent citizens. Liberals argued that [And] **the discretion given to officials was coercive and ineffective**. **Because officials could not** really **tell when offenders were rehabilitated,** why should they have the power to decide when the individual should be released? If the professionals who were responsible for rehabilitation could not demonstrate that they could effectively change offenders (as the Martinson report indicated), then their authority and autonomy in establishing the length of sentences should be severely restricted so that they would have less control over people’s lives. Furthermore, they argued, the wide discretion often results in disparity and unfair sentences that are not remedied through the parole release system. **As a result of the wide discretion allotted to officials in the c**riminal **j**ustice **s**ystem, offenders with similar past histories convicted of similar crimes often served widely disparate sentences whereas those with disparate histories and crimes served similar sentences. Critics of the indeterminate sentencing system argued that **poor and minority offenders were discriminated against,** imprisoned offenders were **coerced into programs, and offenders who challenged prison conditions were denied parole.**

The net benefit turns and outweighs the case. The counter-plan solves institutional racism which is the worst form of identity construction. **Alfieri 99**[[5]](#footnote-5)

The alternative model of race-conscious, **community-oriented prosecutorial discretion** **sets aside** the **colorblind conventions** of advocacy and adjudication well known in the civil **and** criminal justice systems. Instead, this model **seeks to employ critical race theory in developing race-consciousness.** Before implementation, however, this model must first survive the threshold controversy over the meaning of race-consciousness.377 Race-based classification schemes present categorical dilemmas concerning the construction of racial identity and narrative. The di-lemmas implicate Christopher Ford's notion of "administering iden-tity.""378Ford reveals the strained coherence of racial differentiation in regulating race-administration systems.379 Like any assembly combining advocacy and adjudication, these systems labor under the added strain of race-layered interactions of power. In this respect, john powell argues that the very "process of **racial categorizing is a power struggle implicating** structural, cultural, economic, and **identity politics."380 A product of this** struggle, **the prosecutorial role under** the proposed model of **race-conscious discretion** expands to **recast the performative function of racial identity in role-specific** moral **decisionmaking.** David Wilkins discerns this performative function in the role-specific behavior of the black bar during the civil rights movement.381Within such sociolegal movements, Wilkins contends, "race based ties have moral as well as social significance."382For Wilkins,**race consciousness of the self and** of the **other influences moral decisionmaking.**383

## DA

CIR will pass now. Bipartisan and presidential support.

**Free Enterprise 4-26** writes[[6]](#footnote-6)

Sens. Lindsay **Graham** (R-SC) **and** John **McCain** (R-AZ), the two lead negotiators in the Senate’s Gang of Eight immigration reform group, said that they **believe their** immigration reform **bill will** not just **have** a filibuster proof majority in the Senate—but majority **support from both parties and the president. “We have met with the president and he supports strongly our efforts.** He doesn’t agree with every part of the bill, but he recognizes that it is a careful compromise with concessions on all sides,” McCain said. Both senators spoke at the U.S. Chamber’s Reforming Immigration for a Better America event on April 26. (watch the webcast).

McCain acknowledged that there would be changes to the Senate bill, “This is the end of the beginning, not the beginning of the end.” The most contentious provisions, Graham said, will be around low and high-skilled visa programs and access to legal labor. “There will be efforts from the left and the right,” to change the caps on those workers.

The new W Visa for low-skilled workers would start at 20,000 and eventually reach 200,000. The Senate bill also raises the national cap on employment visas for high-skilled foreigners from 65,000 per year to 110,000 per year, with the ability to rise to 180,000 per year under certain economic circumstances.

Nevertheless, **both senators expressed confidence that the bill would pass the Senate with 70 votes, building momentum for House passage.**

Rep. Ted Poe, vice chairman of the House immigration subcommittee and chair of the House Immigration Reform Caucus, said he had misgivings about the Senate approach to dealing with a massive immigration bill and thinks a better way is to have several smaller measures addressing different aspects. He expects the House to deal with as many as 5 to 8 separate, smaller immigration bills, starting with the definition of what constitutes “operational control” of a secure border. “We must methodically look at each of the various components that need to be fixed before we move on,” Poe said.

Business leaders attending the Chamber event, including Mark Peters of Caterpillar Inc., Robin Paulino of Microsoft, and Ken Kimbro of Tyson Foods Inc., voiced support for the Senate proposal. “There is a strong, collective voice from the business community on this issue,” said Peter Schiron, assistant general counsel at Deloitte LLP.

“There is no doubt that there will be additional input and analysis through Senate hearings and amendments. That’s how it should be. We support a transparent and open process and debate,” Chamber President and CEO Tom Donohue told the packed room. “**Given the broad support** this bill has garnered **from business** and labor … from conservatives and liberals … and from **faith-based and civil groups,** I’m optimistic that **this time we have an excellent chance** at getting immigration reform done.”

Polcap’s key to overcome new anti-terror concerns from the Boston Bombing.

**Thomasson 4-27** writes[[7]](#footnote-7)

**The turn-back-the-clock caucus wants to make sure no more** mad **bombers can cross our borders**, like the two who blew up the Boston Marathon, killing three and maiming many. The only problem with that, of course, is that both the suspects — the one who was killed in a shootout, and his younger brother, who was badly wounded and found hiding in a boat in a driveway — were here legally and really didn’t cross any borders. The older brother was even interviewed by the FBI and nominated by the CIA for a government terror watch list, and nothing untoward was found.

Those who really don’t want much except a Chinese-like wall built along our southern border to keep out the perceived riff raff are saying we should reassess an arduously negotiated compromise immigration bill in light of the Boston massacre. They would find some other reason to trash the proposal if the bombing had never taken place. Besides, once you’ve forced all the undocumented to leave, who would be left to build the wall? That’s an old question that is more and more valid.

**Egging on the** self-styled **libertarians** and contrarians in Congress **are the professional dissenters** — those ubiquitous nay saying blabber mouths on radio who incite to riot nearly any chance they get. I mean, there is good money in that nihilist shtick, what with all the paranoids running around waving semi- automatic assault weapons — or hiding under their beds when they aren’t running to the phone to shout, “Kudos to that.”

I’m sorry, but when I first began observing those charged with carrying out the public’s business nearly 60 years of journalism ago, there was some sanity in the conducting of it. Sure, there were crazies then, too, but most people ultimately recognized their diatribes as utterly counterproductive in the end. There were spirited differences in the legislature, but as dusk fell the parties involved were willing to take a chance on putting them aside for the good of all.

But I don’t just want to pick on one side. Aiding and abetting the dysfunction around here is a president who apparently thinks **arm twisting** has no place in political rough-and-tumble. How noble of him. Not only **is** it **a part of the** natural **political order**, so is eye gouging and ear biting and crotch kicking when necessary.

No less a master at that than Lyndon Johnson once told me that sitting down to reason things out always worked better when you had the other person’s arm held firmly behind his back. And Gov. Earl Long of Louisiana said that even ethics had a place in politics because “we use anything we can get our hands on.”

Yet getting four more senators from his own party to pull the lever for a crucial vote the other day apparently was undoable **for** Barack **Obama,** even when the public edge was sufficiently with him. This caused various critics to legitimately complain that **the one ingredient he lacked was forceful leadership**, the kind that makes it unequivocal that if you want something, you better give me what I want. His response was to cry shame and let it go at that.

Valuing rehab kills Obama’s polcap. **Trinick 12** writes[[8]](#footnote-8)

Reasons why criminal justice policy is ignored 1) It’s politically toxic. **Any move to alter the** current **tough stance** on criminal justice **is** inevitably **viewed as** being **‘soft on crime’**, regardless of how much sense a new policy might make or how much it might reduce crime in the long-run. No politician, especially one running in a race as close as the current match-up, wants to be seen as ‘soft on crime’. For Republicans, “the party of law and order”, it would be sacrilege to even suggest a change in policy. For **Democrats, especially Obama,** the **aim** appears to be **to avoid looking “weak and liberal”** and avoid alienating middle-class white voters. In addition, it lacks appeal — few voters (read ‘people likely to vote in swing states’) care about the issue as they perceive that it does not affect them and it requires hard choices to be made. 2) People don’t like to have to think about it. This relates to the point above about having to make hard choices, but there is more to it. By its very nature, criminal justice is difficult and unpleasant to think about and so most people shy away from it — who wants to think about prison and criminals when there’s the new series of Homeland? The majority of people will have no interaction with the criminal justice system, especially not on the ‘wrong’ side of it, and so they shut their eyes, pretend they cannot see the problem and hope it will go away. The politicians and media know this and cater to the demands of their audiences. 3) Changes would require the states and the Federal government to work together. This shouldn’t be a deal-breaker, but it adds more complexity to an already difficult area. **Both states and the federal government maintain prisons** and any systematic attempt to reduce the prison population would require co-operation and negotiation between all the parties. In gridlocked Washington, this would be unlikely even if the topic was not so politically explosive. 4) Criminal justice policy is hard. Really hard. **What should be the moral basis** for imprisoning criminals — Deterrence? **Rehabilitation?** Proportionate punishment? Public protection? **Retribution?** Economic reality? Most countries follow a mix of these, but a different balance of the justifications can alter dramatically the policy pursued in a particular jurisdiction. **Agreeing on the** precise **balance is** something **fraught with** potential for **disagreement, even among** those who have no political concerns, like **academics.** On top of this, of course, is the fact that a **different weighting of** the **justifications can have real cost implications** — for example, both rehabilitation programmes and capital punishment are hugely expensive.

Immigration reform is key to Latin American relations which solve multiple existential risks. Now is key. **Shifter 12** writes[[9]](#footnote-9)

**Some** enduring **problems stand** squarely **in the way of** partnership and **effective cooperation.** The **inability** of Washington **to reform** its broken **immigration** system **is a constant source of friction between the U**nited **S**tates **and** nearly **every other country in the Americas**. Yet US officials rarely refer to immigration as a foreign policy issue. Domestic policy debates on this issue disregard the United States’ hemispheric agenda as well as the interests of other nations. Another chronic irritant is US drug policy, which most Latin Americans now believe makes their drug and crime problems worse. Secretary of State Hillary Clinton, while visiting Mexico, acknowledged that US anti-drug programs have not worked. Yet, despite growing calls and pressure from the region, the United States has shown little interest in exploring alternative approaches. Similarly, Washington’s more than half-century embargo on Cuba, as well as other elements of United States’ Cuba policy, is strongly opposed by all other countries in the hemisphere. Indeed, the US position on these troublesome issues—immigration, drug policy, and Cuba—has set Washington against the consensus view of the hemisphere’s other 34 governments. These issues stand as obstacles to further cooperation in the Americas . The United States and the nations of Latin America and the Caribbean need to resolve them in order to build more productive partnerships. **There are compelling reasons for the U**nited **S**tates **and Latin America to pursue** more **robust ties. Every country** in the Americas **would benefit** from strengthened and expanded economic relations, **with improved access to** each other’s **markets**, investment capital, and energy resources. Even with its current economic problems, **the U**nited **S**tates’ **$16-trillion economy is** a **vital** market and source of capital (including remittances) and technology **for Latin America**, and it could contribute more to the region’s economic performance. For its part, **Latin America’s rising economies will** inevitably **become** more and more **crucial to the U**nited **S**tates’ **economic future. The U**nited **S**tates and many nations of Latin America and the Caribbean **would** also **gain** a great deal **by more cooperation on** such **global matters as climate change**, nuclear **non-prolif**eration, and **democracy and human rights.** With a rapidly expanding US Hispanic population of more than 50 million, the cultural and demographic integration of the United States and Latin America is proceeding at an accelerating pace, setting a firmer basis for hemispheric partnership Despite the multiple opportunities and potential benefits, relations between the United States and Latin America remain disappointing . **If new opportunities are not seized, relations** will likely **continue to drift apart** . The longer the current situation persists, the harder it will be to reverse course and rebuild vigorous cooperation . Hemispheric **affairs require urgent attention**—both from the United States and from Latin America and the Caribbean.

Moral uncertainty means that extinction comes first under any moral system. **Bostrom 2** writes[[10]](#footnote-10)

These reflections on **moral uncertainty suggest[s]** an alternative, complementary way of looking at existential risk. Let me elaborate. Our present understanding of axiology might well be confused. **[that] We may not** now **know**—at least not in concrete detail—**what outcomes would count as a big win for humanity;** we might not even yet be able to imagine the best ends of our journey. If we are indeed profoundly **uncertain about our ultimate aims,** then **we should recognize that there is** a **great option value in preserving**—and ideally improving—**our ability to recognize value and to steer the future accordingly. Ensuring that there will be a future version of humanity with great powers and a propensity to use them wisely is** plausibly **the best way** available to us **to increase the probability that the future will contain a lot of value.**

Moral uncertainty is high now, but there’s room for improvement. **Parfit 84** writes[[11]](#footnote-11)

Some people believe that there cannot be progress in Ethics, since everything has been already said. Like Rawls and Nagel, I believe the opposite. How many people have made Non-Religious Ethics their life's work? Before the recent past, very few. In most civilizations, **most people have believed in** the existence of a **God**, or of several gods. A large minority were in fact Atheists, whatever they pretended. But, **before the recent past, very few Atheists made Ethics their life’s work.** Buddha may be among this few, as may Confucius, and a few Ancient Greeks and Romans. After more than a thousand years, there were a few more between the Sixteenth and Twentieth centuries. Hume was an atheist who made Ethics part of his life's work. Sidgwick was another. **After Sidgwick,** there were several **atheists** who were professional moral philosophers. But most of these **did not do Ethics. They did Meta-Ethics.** They did not ask which outcomes would be good or bad, or which acts would be right or wrong. They asked, and wrote about, only the meaning of moral language, and the question of objectivity. **Non-Religious Ethics has been systematically studied**, by many people, **only since the** 19**60s. Compared with the other sciences**, Non-Religious **Ethics is** the youngest and **the least advanced.**

Adopt a parliamentary model to account for moral uncertainty. This entails minimizing existential risks. **Bostrom 9** writes[[12]](#footnote-12)

It seems people are overconfident about their moral beliefs.  But **how should one** reason and **act if one** acknowledges that one **is uncertain about morality** – not just applied ethics but fundamental moral issues? if you don't know which moral theory is correct?

It doesn't seem **you can[’t] simply plug your uncertainty into expected utility** decision theory and crank the wheel; **because many** moral **theories** state that you **should not** always **maximize** expected **utility.**

Even if we limit consideration to consequentialist theories, it still is hard to see how to combine them in the standard decision theoretic framework.  For example, suppose you give X% probability to total utilitarianism and (100-X)% to average utilitarianism.  Now an action might add 5 utils to total happiness and decrease average happiness by 2 utils.  (This could happen, e.g. if you create a new happy person that is less happy than the people who already existed.)  Now what do you do, for different values of X?

The problem gets even more complicated if we consider not only consequentialist theories but also deontological theories, contractarian theories, virtue ethics, etc.  We might even throw various meta-ethical theories into the stew: error theory, relativism, etc.

I'm working on a paper on this together with my colleague Toby Ord.  We have some arguments against a few possible "solutions" that we think don't work.  On the positive side we have some tricks that work for a few special cases.  But beyond that, the best **we have managed** so far is **a** kind of **metaphor, which** we don't think is literally and exactly correct, and it is a bit under-determined, but it **seems to get things roughly right** and it might point in the right direction:

**The Parliamentary Model.**  Suppose that you have a set of mutually exclusive moral theories, and that you assign each of these some probability.  Now imagine that **each** of these **theorie**s **gets to send** some number of **delegates to The Parliament**.  The number of delegates each theory gets to send is **proportional to the probability of the theory.**  Then the delegates bargain with one another for support on various issues; and the Parliament reaches a decision by the delegates voting.  What you should do is act according to the decisions of this imaginary Parliament.  (Actually, we use an extra trick here: we imagine that the delegates act as if the Parliament's decision were a stochastic variable such that the probability of the Parliament taking action A is proportional to the fraction of votes for A.  This has the effect of eliminating the artificial 50% threshold that otherwise gives a majority bloc absolute power.  Yet – unbeknownst to the delegates – the Parliament always takes whatever action got the most votes: this way we avoid paying the cost of the randomization!)

The idea here is that moral theories get more influence the more probable they are; yet **even a** relatively **weak theory can still get its way on some issues** that the theory think are extremely important **by sacrificing** its influence **on other** i**s**sues that other theories deem more important.  For example, **suppose you assign 10% probability to** total **util**itarianism and 90% to moral egoism (just to illustrate the principle).  Then **the Parliament** would mostly take actions that maximize egoistic satisfaction; however it **would make some concessions to util**itarianism **on** issues that utilitarianism thinks is especially important.  In this example, the person might donate some portion of their income to **existential risks** research and otherwise live completely selfishly.

I think there might be wisdom in **this model**.  It **avoids the** dangerous and **unstable extremism** that would result **from letting one’s current favorite moral theory completely dictate action**, while still allowing the aggressive pursuit of some non-commonsensical high-leverage strategies so long as they don’t infringe too much on what other major moral theories deem centrally important.

## Case

### Framework

Accepting Butler’s politics makes oppression more likely. **Nussbaum 99** writes[[13]](#footnote-13)

There is a void, then, at the heart of Butler's notion of politics. This void can look liberating, because the reader fills it implicitly with a normative theory of human equality or dignity. But let there be no mistake: for Butler, as for Foucault, subversion is subversion, and it can in principle go in any direction. Indeed, **Butler's naively empty politics is** especially **dangerous** for the very causes she holds dear. For every friend of Butler, eager to engage in subversive performances that proclaim the repressiveness of heterosexual gender norms, there are **dozens** who **would like to engage in subversive performances that flout** the norms of **tax compliance,** of **non-discrimination, of decent treatment** of one's fellow students. **To such people we should say, you can**no**t** simply **resist as you please, for there are norms of fairness**, decency, **and dignity** that entail that this is bad behavior. But then we have to articulate those norms-and this Butler refuses to do.

Butler dooms us to endless violent domination by power structures

**Nussbaum 99** writes[[14]](#footnote-14)

Isn't this like saying to a slave that the institution of slavery will never change, but you can find ways of mocking it and subverting it, finding your personal freedom within those acts of carefully limited defiance? Yet it is a fact that **the institution of slavery** can be changed, and **was changed**-but not by people who took a Butler-like view of the possibilities. It was changed **because people did not rest content with parodic performance: they demanded**, and to some extent they got, **social upheaval.** It is also a fact that the **institutional structures that shape women's lives have changed. The law** of rape, still defective, **has** at least **improved**; the law of sexual harassment exists, where it did not exist before; marriage is no longer regarded as giving men monarchical control over women's bodies. **These things were changed by feminists who would not take parodic performance as their answer**, who thought that power, where bad, should, and would, yield before justice. **Butler** not only eschews such a hope, she takes pleasure in its impossibility. She finds it exciting to contemplate the alleged immovability of power, and to envisage the ritual subversions of the slave who is convinced that she must remain such. She tells us-this is the central thesis of The Psychic Life of Power-that we all eroticize the power structures that oppress us, and can thus find sexual pleasure only within their confines. It seems to be for that reason that she **prefers** the sexy acts of **parodic subversion to** any **lasting** material or **institutional change.** Real change would so uproot our psyches that it would make sexual satisfaction impossible. Our libidos are the creation of the bad enslaving forces, and thus necessarily sadomasochistic in structure.

Butler is useless outside an insular audience and is just as likely to cause oppression as prevent it. **Nussbaum 99** writes[[15]](#footnote-15)

This idea of waiting to see what we get--in a word, this moral passivity-- seems plausible in Butler because she tacitly assumes an audience of likeminded readers who agree (sort of) about what the bad things are-discrimination against gays and lesbians, the unequal and hierarchical treatment of women-and who even agree (sort of) about why they are bad (they subordinate some people to others, they deny people freedoms that they ought to have). But take that assumption away, and the absence of a normative dimension becomes a severe problem. Try teaching Foucault at a contemporary law school, as I have, and you will quickly find that **subversion takes many forms, not all of them congenial to Butler** and her allies. As a perceptive libertarian student said to me, **Why can't I use these ideas to resist the tax structure, or** the **antidiscrimination laws**, or perhaps even to join the militias**? Others,** less fond of liberty, **might engage in** the **subversive performances of making fun of feminist remarks** in class, or ripping down the posters of the lesbian and gay law students' association. These things happen. **They are parodic and subversive. Why, then, aren't they daring and good?**

Butler’s politics provide only false hope. **Nussbaum 99** writes[[16]](#footnote-16)

Many feminists in America are still theorizing in a way that supports material change and responds to the situation of the most oppressed. Increasingly, however, the academic and cultural trend is toward the pessimistic flirtatiousness represented by the theorizing of Butler and her followers. **Butlerian feminism** is in many ways easier than the old feminism. It tells scores of talented young women that they need not work on changing the law, or feeding the hungry, or assailing power through theory harnessed to material politics. They can do politics in safety of their campuses, remaining on the symbolic level, making subversive gestures at power through speech and gesture. This, the theory says, is pretty much all that is available to us anyway, by way of political action, and isn't it exciting and sexy? In its small way, of course, this **is a hopeful politics.** It instructs people that they can, right now, without compromising their security, do something bold. But **the boldness is entirely gestural, and** insofar **as Butler's ideal suggests that** these **symbolic gestures really are political change, it offers** only a **false hope.** Hungry women are not fed by this, **battered women are not sheltered by it, raped women do not find justice in it**, gays and lesbians do not achieve legal protections through it.

Butler’s theories are invalidated by a weak understanding of psychology. **Campbell 1** writes[[17]](#footnote-17)

**Butler’s missed encounter with the psychoanalytic unconscious traps her theory of the subject** within the philosophical discourse of the conscious self. The fundamental psychoanalytic distinction between the conscious and the unconscious reveals “reason’s inability to come outside of itself, to enclose and know itself from the outside: the inadequation of the subject and its other” (Grosz, 1993, p. 189). Psychic Life continually repeats, and is haunted by, the impossible task of understanding the “being conscious of self, the fully conscious self.” The aporia of **the unconscious in Butler’s theory** of the subject **prevents her from theorising the psychic life of power.** Psychic Life articulates an extremely important political and theoretical problematic for contemporary theory. Politically, it provides a critical account of the formation of identity in power. Theoretically, it deploys both Foucault and Freud to produce this critical account, opening the possibility of a powerful intersection of Foucauldian and psychoanalytic theory. **Butler’s** repetition of philosophical discourse, and her **failure to undertake a psychoanalytic discourse**, however, **prevents her from developing this important** theoretical and **political project.** Instead, like the return of the repressed, that project continually suffers the plague of the (repressed) unconscious. In order to understand the psychic life of power, it is necessary to reconsider the problematic relationship between the political subject of Foucault and the unconscious subject of Freud.

Butler’s writing is intentionally vague. Accepting her arguments constitutes us as mindless and subservient. **Nussbaum 99** writes[[18]](#footnote-18)

To whom, then, is Butler speaking? It would seem that she is addressing a group of young feminist theorists in the academy who are neither students of philosophy, caring about what Althusser and Freud and Kripke really said, nor outsiders, needing to be informed about the nature of their projects and persuaded of their worth. This implied audience is imagined as remarkably docile. Subservient to the oracular voice of Butler's text, and dazzled by its patina of high-concept abstractness, the imagined reader poses few questions, requests no arguments and no clear definitions of terms. Still more strangely, the implied reader is expected not to care greatly about Butler's own final view on many matters. For **a large proportion of the sentences in any book by Butler**-especially sentences near the end of chapters-**are questions.** Sometimes **the answer[s]** that the question expects is evident. But often things **are** much more **indeterminate.** Among the non-interrogative sentences, many begin with "Consider..." or "One could suggest..."-in such a way that **Butler never quite tells the reader whether she approves of the view described. Mystification as well as hierarchy are the tools of her practice**, a mystification **that eludes criticism because it makes few definite claims.**

### Contention

1. TURN – focus on rehab as an ideal masks coercive state power.

**Logan and Gaes 93** write[[19]](#footnote-19)

Proponents believe that rehabilitation programs reduce the harshness of imprisonment by softening and humanizing the prison environment. But what if this effect is more apparent than real? What if **prisons merely pay lip service to the ideal of rehab**ilitation **and create** what amounts to **a facade** of fine-sounding programs **that masks the harsh reality of doing time? Might this** approach not **reduce pressure** from the public **for real reform? A veneer of good intentions could undermine** the vigilance and the **restraint of power** that we need to maintain a system of just punishment. Rather than softening the pains of imprisonment, the rehabilitative goal may even add injustice to injury because it encourages individualized treatment, which undermines consistency and fairness. Individualized treatment requires discretion, which lends itself to abuse in the form of arbitrary and capricious distinctions. In pursuit of rehabilitation, offenders who have committed similar wrongs often are treated differently because of differences in personality, background, and social skills. Furthermore, when rehabilitative treatment is defined as an official goal of the agents and institutions of authority, then treatment, too, becomes paternalistic and authoritarian. The result is cynicism and resistance on the part of the intended beneficiaries. If our goal is to reform the conditions of life inside prisons, it is better to do so directly than under the rubric of rehabilitation. The direct approach has less chance of backfiring.

2. TURN – rehab causes paternalism. **Logan and Gaes 93** write[[20]](#footnote-20)

Proponents believe that rehabilitation programs reduce the harshness of imprisonment by softening and humanizing the prison environment. But what if this effect is more apparent than real? What if prisons merely pay lip service to the ideal of rehabilitation and create what amounts to a facade of fine-sounding programs that masks the harsh reality of doing time? Might this approach not reduce pressure from the public for real reform? A veneer of good intentions could undermine the vigilance and the restraint of power that we need to maintain a system of just punishment. Rather than softening the pains of imprisonment, **the rehab**ilitative **goal may even add injustice** to injury **because it encourages individualized treatment, which undermines consistency and fairness.** Individualized treatment requires discretion, which lends itself to abuse in the form of arbitrary and capricious distinctions. **In pursuit of rehab**ilitation, **offenders** who have committed similar wrongs often **are treated differently because of differences in personality**, background, **and social skills.** Furthermore, **when rehab**ilitative treatment **is defined as an official goal** of the agents and institutions of authority, then **treatment**, too, **becomes paternalistic and authoritarian.** The result is cynicism and resistance on the part of the intended beneficiaries. If our goal is to reform the conditions of life inside prisons, it is better to do so directly than under the rubric of rehabilitation. The direct approach has less chance of backfiring.

3. There is no unique offense to the aff. We can provide treatment for retributive reasons as part of humane punishment without intending rehab. Separating treatment from rehabilitative ideology respects criminals while avoiding paternalism. **Logan and Gaes 93** write[[21]](#footnote-21)

Another way to preserve **treatment programs** for prisoners would be to justify them on grounds that would be relevant even if rehabilitation were not an official goal of the system. Many programs currently offered in prisons **could be separated from the** context and **vocab**ulary **of** "**rehab**ilitation," **and** could be **justified instead in the context** and with the vocabulary **of "confinement." Despite a decline in official endorsement of** the **rehab**ilitative ideal, **many** corrections **officials** continue to **endorse programs because of their normalizing effect on the prison environment**, not because they believe in effecting a change in the inmates. In addition, many corrections officials endorse the view that some programs work for some inmates in the sense that those who want to change should receive the opportunity to change. Both of these goals— time spent constructively and the opportunity to acquire skills— still can be pursued without the baggage of the rehabilitative ideal. John DiIulio (1991:114) notes that most prison and jail administrators view correctional programs from what he calls an "institutional perspective." That is, they "evaluate programs not mainly in terms of what they do to reduce the likelihood of recidivism or otherwise affect inmates' post-release behavior but as institutional management tools.” DiIulio also suggests that **programs can be defended** in less utilitarian terms **simply as part of** what we mean by **humane conditions of confinement.** A "confinement model" of imprisonment (Logan 1991: ch. 1) would be a follow-up to the "justice model" of sentencing. The confinement model, like the justice model, is based on a purely retributive philosophy of punishment. In this philosophy, the essential purpose of imprisonment is to punish offenders–fairly and justly–through lengths of confinement proportionate to the seriousness of their crimes. Although confinement may serve other purposes in addition to justice and punishment, those are the necessary and sufficient conditions for justifying it. Thus the term confinement model may be regarded as a shorthand for a clumsier but more explicit label: the doing-justice-through-confinement-as-a-form-of-punishment model. **Under the confinement model, offenders are sent to prison as punishment, not for punishment. Thus, prisons** operated on this model **need not be harsh or internally punitive**, nor would they be insensitive to the welfare of prisoners. Coercive confinement carries an obligation to meet prisoners' basic needs at a reasonable standard of decency, so measures of health care, safety, sanitation, nutrition, and other aspects of basic living conditions are relevant. Furthermore, confinement must meet constitutional standards of fairness and due process, so not only effectiveness and efficiency, but also the procedural justice with which confinement is imposed, are important. In addition–and most relevant to this discussion–programmatic **activities** such as education, recreation, and work **can be viewed as part of the conditions of confinement, regardless of** their alleged effects on **rehab**ilitation. In short, confinement is much more than merely warehousing.

**Here is a mission statement for** a prison under **the confinement model: “The mission** of a prison **is to keep prisoners**–to keep them in, keep them safe, keep them in line, keep them healthy, and keep them busy–and to do it with fairness, **without undue suffering,** and as efficiently as possible.” Many inmate **programs** currently offered in prisons–such as work, training, education, and recreation-**can be justified under the heading of** constructive activity (**"keep them busy"**). "Constructive" activity is not defined here as "contributing to the betterment of inmates" but as activity that is, on its face, consistent with the orderly, safe, secure, and humane operation of a prison. Idleness and boredom can be viewed as wrong from a work ethic standpoint, or as unnatural because human beings are not meant to be idle, or as so fundamentally related to mischief as to be undesirable for that reason. In any case, prison programs can be defended as forms of constructive and meaningful activity and as antidotes to idleness, without invoking claims of rehabilitative effectiveness. This is not to say that it does not matter whether the programs have any rehabilitative effects; it would be fine if they did so. But when we say that the primary purpose of prison is to punish through confinement, we become more interested in the operation of these programs inside the prison gates and less concerned about their effects beyond. It is the duty of prisons to govern fairly and well within their own walls. It is not their duty to reform, rehabilitate, or reintegrate offenders into society. Though they may attempt these things, it is not their duty even to attempt these goals, let alone their obligation to achieve them. **Prisons ought not to impose upon themselves, by inclusion in a mission statement, any responsibility for inmates' future conduct**, welfare, or social adjustment. These are primarily the responsibility of the offenders themselves, and perhaps secondarily a concern of some others outside the justice system. They should not be declared the official business of prisons.

1. Anthony V. Alfieri (Professor of Law at the University of Miami). “Prosecuting Race.” April 1999. [↑](#footnote-ref-1)
2. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-2)
3. Anthony V. Alfieri (Professor of Law at the University of Miami). “Prosecuting Race.” April 1999. [↑](#footnote-ref-3)
4. Dorris MacKenzie [University of Maryland, College Park], What Works in Corrections: Reducing the Criminal Activities of Offenders and Delinquents, 2006 [↑](#footnote-ref-4)
5. Prosecuting Race. Anthony V. Alfieri. April 1999. Professor Of Law At The University Of Miami [↑](#footnote-ref-5)
6. Free Enterprise (Free Enterprise is a US Chamber of Commerce digital platform). “Senators: Immigration Reform Bill Likely to Pass With 70 Votes.” 26 April 2013.  
   <http://www.freeenterprise.com/immigration/senators-immigration-reform-bill-likely-pass-70-votes> [↑](#footnote-ref-6)
7. Dan K. Thomasson. “Don’t let bombings delay immigration reform.” Santa Maria Times. 27 April 2013. <http://santamariatimes.com/news/opinion/editorial/columnist/dan_thomasson/don-t-let-bombings-delay-immigration-reform/article_cc539976-aed3-11e2-8e68-0019bb2963f4.html> [↑](#footnote-ref-7)
8. Richard Trinick [Currently working for a legal software start-up company in London, Richard graduated in Jurisprudence (Law) from the University of Oxford and is a future joiner of Hogan Lovells LLP. His blogging interests include just about anything with a legal or political angle on either side of the pond. Away from a computer Richard enjoys great food, exciting music, any sport except golf, and gripping TV (not to mention giving recommendations about all of these things). All opinions are his own.] Why Won’t The Candidates Talk About Prisons? 17 October 2012. <http://www.article-3.com/why-wont-the-candidates-talk-about-prisons-99475> [↑](#footnote-ref-8)
9. Michael Shifter is the President of Inter-American Dialogue. “Remaking the Relationship: The United States and Latin America,” April 2012, IAD Policy Report, http://www.thedialogue.org/PublicationFiles/IAD2012PolicyReportFINAL.pdf [↑](#footnote-ref-9)
10. Nick Bostrom, 2001 prof of Philosophy, Oxford University [ Journal of Evolution and Technology, Vol. 9, March 2002. First version: 2001 March, JStor [↑](#footnote-ref-10)
11. Derek Parfit, Reasons and Persons (Oxford: Clarendon, 1984). P. 453. [↑](#footnote-ref-11)
12. Bostrom, Nick (*Existential*ist of a different sort). “Moral uncertainty – toward a solution?” 1 January 2009. <http://www.overcomingbias.com/2009/01/moral-uncertainty-towards-a-solution.html> [↑](#footnote-ref-12)
13. Martha Nussbaum, prof of law & ethics @ U of Chicago, *The New Republic*, 1999, vol 220 (8) [↑](#footnote-ref-13)
14. Martha Nussbaum, prof of law & ethics @ U of Chicago, *The New Republic*, 1999, vol 220 (8) [↑](#footnote-ref-14)
15. Martha Nussbaum, prof of law & ethics @ U of Chicago, *The New Republic*, 1999, vol 220 (8) [↑](#footnote-ref-15)
16. Martha Nussbaum, prof of law & ethics @ U of Chicago, *The New Republic*, 1999, vol 220 (8) [↑](#footnote-ref-16)
17. Kirsten Campbell, prof of sociology @ U of London, *International Journal of Sexuality and Gender Studies,* Vol. 6, Nos. 1/2, 2001 [↑](#footnote-ref-17)
18. Martha Nussbaum, prof of law & ethics @ U of Chicago, *The New Republic*, 1999, vol 220 (8) [↑](#footnote-ref-18)
19. CHARLES H. LOGAN (University of Connecticut) and GERALD G. GAES (Federal Bureau of Prisons). META-ANALYSIS AND THE REHABILITATION OF PUNISHMENT. JUSTICE QUARTERLY, Vol. 10 No. 2, June 1993. <http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprlogangaes.pdf> [↑](#footnote-ref-19)
20. CHARLES H. LOGAN (University of Connecticut) and GERALD G. GAES (Federal Bureau of Prisons). META-ANALYSIS AND THE REHABILITATION OF PUNISHMENT. JUSTICE QUARTERLY, Vol. 10 No. 2, June 1993. <http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprlogangaes.pdf> [↑](#footnote-ref-20)
21. CHARLES H. LOGAN (University of Connecticut) and GERALD G. GAES (Federal Bureau of Prisons). META-ANALYSIS AND THE REHABILITATION OF PUNISHMENT. JUSTICE QUARTERLY, Vol. 10 No. 2, June 1993. <http://www.bop.gov/news/research_projects/published_reports/cond_envir/oreprlogangaes.pdf> [↑](#footnote-ref-21)